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No. 564

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE GENERAL INDUSTRIES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I

The position taken by respondent in its brief on the merits, filed February 1, 1947, raises a question as to the scope of the issues which this Court should now undertake to consider and decide.

A brief review of the course of the litigation may be helpful. The Administrator brought suit to restrain alleged violations of the overtime provisions of the Fair Labor Standards Act with respect to three engineers employed by respondent (R. 5–7, 10). Respondent answered that these

employees were exempt as executive or administrative employees under Section 13 (a) (1) and the Administrator's regulations (R. 20, 23, 102).[1] The district court found that the engineers were employed as executives, and therefore denied an injunction (R. 152). On appeal, the court below held that this finding was not sustained by the evidence (R. 162), but affirmed the district court's decree on the ground that the employees were compensated for overtime employment in accordance with the requirements of Section 7 of the Act (R. 164).

The only question presented in the Government's petition for certiorari was "whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum." (Pet. 2.) The respondent's brief in opposition to certiorari was similarly limited to the Section 7 issue: it urged that the decision below was correct in this regard, that

[1] Title 29, Chapter V, Code of Federal Regulations, Part 541, sec. 541.1, 5 F. R. 4077 (Regulations of the Administrator, Wage and Hour Division, U. S. Department of Labor, October 24, 1940, amended January 17, 1942). These regulations have been incorporated in the record of this case (R. 134).

there was no conflict with the controlling decisions of this Court, and that the petition should therefore be denied.

In preparing its brief on the merits, the Government assumed that the only question as to which the Court would desire to hear argument was that presented in the petition for certiorari. However, respondent's brief on the merits has, in effect, abandoned its prior contentions as to Section 7, and raises anew the issue as to whether the three engineers are "executive" employees.

In these circumstances it is suggested that the Court may appropriately limit its review to the Section 7 issue. On the one hand, respondent is, of course, entitled to urge any ground in support of the judgment below. On the other hand, review on writ of certiorari is ordinarily limited by this Court to the questions presented in the petition. This principle would seem to have particular force in a situation such as that involved here. Whether the three engineers employed by respondent were properly found by the district court to be "executive" employees is, we believe, a question which this Court would not ordinarily deem appropriate for review. The issue is peculiar to this case; it calls for appraisal of detailed technical evidence; it involves no issue of federal law as to which the circuit courts of appeals are in conflict; and its importance is, at least, con-

jectural.[2] If the Section 7 issue in this case is not reached, the net result would be a decision by this Court on an issue not sufficiently important to warrant certiorari, while the only question calling for Supreme Court review would remain unanswered.

This Court has frequently observed that its unique role in the American constitutional system requires that it limit its discretionary jurisdiction to the determination of controversies whose importance and character call for review by the highest court in the land. It may be questioned whether, in the circumstances of this case, the Court should exercise its discretion to enlarge its review beyond the Section 7 question, which was the only issue tendered by the parties upon the Court's consideration of the petition for certiorari.

II

If the Court should undertake to inquire into the question whether these employees were "executives," we submit that the ruling of the court

[2] Certiorari has twice been sought on this type of question, and in each case it was denied by this Court. See *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746; *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728. While, as pointed out by respondent (Brief for Respondent, p. 12), the court below held that a fourth employee was exempt under Section 13 (a) (1), the Government did not deem this question of sufficient importance to include it in the petition for certiorari.

below in this regard should not be disturbed. In setting up the "executive" exemption as an affirmative defense in this case,[3] respondent has not challenged the validity of the regulations issued by the Administrator.[4] Nor is it disputed that, since the regulation defining "executive" is phrased in the conjunctive, all six of the conditions must be met before the exemption from the Act will apply.[5] These conditions are, briefly, that the "executive" (A) have as his "primary duty" the management of the establishment or of

[3] Under Federal Rule 8 (c) of Civil Procedure, the burden of pleading and proving this defense is, of course, on the party claiming it, and the circuit courts of appeals have so held in decisions under this Act. *Schmidtke* v. *Conesa*, 141 F. 2d 634, 635 (C. C. A. 1); *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Fletcher* v. *Grinnell Brothers*, 150 F. 2d 337, 340–341 (C. C. A. 6); *Smith* v. *Porter*, 143 F. 2d 292, 294 (C. C. A. 8). As this Court recognized in *Phillips Co.* v. *Walling*, 324 U. S. 490, 493, "any exemption from [this] humanitarian and remedial legislation must * * * be narrowly construed."

[4] These regulations have been upheld by every circuit court of appeals which has passed on them. *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746; *Fanelli* v. *United States Gypsum Co.*, 141 F. 2d 216 (C. C. A. 2); *Helliwell* v. *Haberman*, 140 F. 2d 833 (C. C. A. 2); *Schmidt* v. *Emigrant Industrial Savings Bank*, 148 F. 2d 294 (C. C. A. 2); *Allen* v. *Atlantic Co.*, 145 F. 2d 761 (C. C. A. 5); *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8); *Knight* v. *Mantel*, 135 F. 2d 514 (C. C. A. 8); *Joseph* v. *Ray*, 139 F. 2d 409 (C. C. A. 10); *Walling* v. *Yeakley*, 140 F. 2d 830 (C. C. A. 10).

[5] *George Lawley & Son Corp.* v. *South*, 140 F. 2d 439 (C. C. A. 1); *Fanelli* v. *United States Gypsum Co.*, 141 F. 2d 216 (C. C. A. 2); *Smith* v. *Porter*, 143 F. 2d 292 (C. C. A. 8).

a customarily recognized department; (B) "customarily and regularly" direct the work of other employees; (C) have the authority to hire or fire other employees or, in the alternative, that his recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees be given particular weight; (D) "customarily and regularly" exercise "discretionary powers"; (E) be paid on a salary basis of not less than $30 per week; and (F) do not perform work of the same nature as that performed by employees under his supervision for more than 20 percent of the number of hours worked by those employees.

While the district court's "findings" stated, in the language of the Administrator's regulations, that the engineers in question met the conditions prescribed in the regulations, the court found no evidentiary facts to support such statements, and the record affords no basis whatever for a finding that the engineers meet any of the conditions, other than payment on a salary basis of not less than $30 per week. The circuit court of appeals correctly held that the district court's findings on this question were "clearly erroneous."[6]

[6] Respondent argues, in support of its contention that the engineers were exempt, that they "had always been recognized as foremen" (Brief for Respondent, p. 6), and that they receive various benefits accorded to supervisory employees (*Id.*, p. 6). While this may help to explain the company's belief that the men were exempt, neither those facts nor the

(A) With respect to the first condition, that the employee's "primary duty" consist of the management of the establishment where he is employed or of a customarily recognized department or subdivision thereof, the district court's finding (Finding 9, R. 149), referred to the "Steam and Electric Power Generating and Heating Department" as the "department or subdivision" in which the engineers were asserted to be executives and stated that the three operating engineers "were employed as foremen or supervisors * * * under a Chief Engineer in charge of the entire Department" and that "their primary duty consisted of the management" of that department. *Ibid.* This statement is clearly contrary to the evidence, and is, indeed, inconsistent with other statements in the same finding. Although the capitalized reference by the district court to a "Steam and Electric Power Generating and Heating Department"[7] would indicate that this

fact that the union may have finally conceded in 1944 that these employees were "foremen" or "supervisory employees" are relevant in determining whether they are "executive" employees under the tests provided by the Administrator's regulations. As is made clear by the last condition of application of the exemption (the "20 percent" test), "working foremen," though supervisory employees in every sense of the word, are nevertheless not exempt as "executives" under the regulations. See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, pp. 15–17, referred to *infra*, p. 8.

[7] It may be noted, however, that later in the same paragraph the court refers to it as the "Electric and Steam Generating and Heating Department" (Finding 9, R. 149).

was a recognized department in the plant, it is nowhere referred to as such in the record.

It is not even clear from the finding whether the "department or subdivision" is the engine room or the entire power plant, consisting of both the engine room and the boiler room; the district court's opinion implies that it is the engine room alone, since it states that "there were no other employees in that department or subdivision" (R. 138). If the operating engineers were the only employees in the engine room, they had nothing but machinery to manage. The definition as a whole [8] and the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, pp. 10–11,[9] make it clear that "managements," as used in paragraph (A) of the regulations, includes managerial authority over some personnel in addition to other executive responsibilities. The Report was officially adopted by the Administrator as his construction of the regulations, and if there were any ambiguity would be the "ultimate criterion * * * which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414.

It is equally clear that the engineers did not manage the boiler room. While O. W. Marsh,

[8] Particularly the requirement (B) as to supervision.

[9] Copies of the Report have been filed with the Clerk of the Court.

respondent's vice president and factory manager, testified that the company regarded the engineer on duty as being in charge of the entire power plant, his status as such must have been purely theoretical. The uncontradicted testimony of Page (R. 43, 45, 49, 53), Spooner (R. 56–57, 60), and Stegman (R. 65, 68–71) was that they did not in any way manage the boiler room. Their activities were limited to the engine room,[10] and even there they look to the chief engineer for supervision and orders. In the same finding (Finding 9, R. 149), in which the district court concluded that "their primary duty consisted of the management of the * * * Department, it described their duties as follows:

> * * * they were required to keep the machinery of the Department in good operating condition by packing, wiping, mopping, oiling, and making emergency repairs to the equipment; to read gauges, to listen for sounds indicative of any disorder; to make minor adjustments; to take appropriate action to supply steam necessary to operate the power plant which was dependent upon steam from the boiler room, and to report to their immediate superior any failure or breakdown for which they were unable to provide * * *.

[10] Except when they occasionally pitched in and helped to fire the oilers because "there's a war on" (R. 53) or "to help the plant out" (R. 56).

Thus, while the court attempted to bring the engineers within paragraph (A) of the regulations, the evidentiary facts found by it are inconsistent, on their face, with the conclusion that management was the "primary duty" of these employees.

(B) The district court's findings state that these employees "customarily and regularly directed the work of other employees in the Department" (Finding 9, R. 149). Again no evidentiary facts are found, and the evidence plainly contradicts this statement. As already indicated, there were no other employees in the engine room (R. 138). The company presented no testimony that the engineers customarily and regularly directed the work of the boiler room employees, and the three engineers testified that they did not direct those employees (R. 43, 49, 53, 56, 60, 65, 68, 70–71). They looked to the Chief Engineer, Latteman, as being in charge of both the engine room and the boiler room. On the one or two occasions in a period of several years when one of the engineers ventured to make suggestions to the boiler room employees, he was unsuccessful (R. 56). The district court's statement in its opinion that "the boiler stokers declined to take orders from the engineers, except Latteman, the chief engineer" (R. 138)—and this statement is supported by uncontradicted evidence (R. 56–57, 60, 67)—is hardly consistent with the con-

clusion that the engineers "customarily and regularly" directed the work of the boiler stokers."[11]

At best, respondent's witnesses established that the company wanted the engineers to act as foreman (R. 110). Even if this contention be accepted, the test under the Administrator's regulations is what the employees in fact did—whether they "customarily and regularly" supervised other workers.

At the argument of the case, respondent's counsel attempted to explain the refusal of the operating engineers to "supervise," and of the boiler room employees to be supervised by them, as due to a dispute with the union which was settled in

[11] Respondent, although apparently conceding that the operating engineers did not supervise the boiler stokers directly, relies on the district court's statement that they did so "through the chief engineer" (R. 138). The evidence in the record does not support this statement and shows, at best, that the operating engineers called the chief engineer when anything went wrong (R. 43, 56). This certainly does not amount to supervision, either direct or indirect. But even if it be assumed that the operating engineers did supervise the boiler stokers "through the chief engineer," the regulations make it clear that *direct* supervision is necessary to bring an employee within the test. Thus, when the Administrator intended to provide for indirect as well as direct action on the part of the "executive," he expressly said so in the regulations. For example, the test in paragraph (C) is "hiring or firing" or making "suggestions and recommendations" to that effect. In contrast, paragraph (B), requiring that the employee must be one "who customarily and regularly directs the work of other employees," obviously calls for direct supervision over those "other employees."

July 1944, at about the time when the engineers signed an agreement "to be regarded as Foreman, as in the past, with Foremen privileges and continue on a salary basis" (R. 151). The uncontradicted evidence, however, shows that, even following this settlement, up to and including the time of the trial of this case (March 22–23, 1945), the engineers did not attempt to supervise the boiler room employees and the latter declined to accept their supervision (R. 43, 49, 53, 56, 60, 65, 68, 70–71).

Respondent's argument seems to reduce itself to the contention that the exigencies of its business required around-the-clock operation and that, apart from the chief engineer, the operating engineers "are the only supervision the Company has in the Power Plant for the twenty-four hour service" (Brief for Respondent, pp. 5–6). The very fact that the power plant was operated successfully during a number of difficult war years with only the chief engineer exercising any supervision is a sufficient indication that the operating engineers were really needed and hired not to "supervise" but simply to perform a skilled mechanical task—that of operating and maintaining the power machinery in the engine room.

In finding that the engineers were "executives," the trial court was also apparently influenced by its view that "there is a necessity for considering

certain employees as executives or administrators when they are entrusted with the complex and delicate machinery of modern times. It often requires as much skill, discretion and judgment to keep such machinery in harmonious operation as to keep subordinates in cooperation" (R. 140). In framing his regulation, the Administrator followed the common usage of the term "executive" to apply only to those who supervise others. The Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, preceding the discussion of the items making up the definition of executive, specifically limited it to a "person who is a boss over men" or "whose responsibility is directly managerial—employees, in other words, who, in addition to other responsibilities, are concerned with the supervision of other workers" (Report, pp. 4, 10). As a contemporaneous construcion of the regulations by the Administrator who issued them, this Report is entitled to controlling weight. *Bowles* v. *Seminole Rock & Sand Co., supra.*

(C) There is likewise no evidence whatsoever that these employees met the third condition, that the executive have power to hire or fire, or that his suggestions and recommendations as to hiring, firing, promotion or other change of status of other employees be given great weight. It is not contended that the engineers had any authority to

hire or fire other employees, but the district court's finding states that "their recommendations and suggestions as to change of status of other employees would be given particular weight" (Finding 9, R. 149). There is not a scintilla of evidence in the record to support this statement. The company did not point out a single instance where the engineers had made any such recommendation (its witnesses did not even mention this point), and the engineers denied that they had done so or that it was their business to do so (R. 45, 56, 60, 65).[12]

(D) A fourth condition of the exemption is that the employee customarily and regularly exercise discretionary powers. The finding of the dis-

[12] It may be noted that the courts repeatedly have held the exemption inapplicable even where there was unquestionably more control over other employees than there was here. See *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn.), affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728 (chief radio engineer); *Schmidt* v. *Emigrant Industrial Savings Bank*, 7 Wage Hour Rept. 623 (S. D. N. Y.), affirmed, 148 F. 2d 294 (C. C. A. 2) (building superintendent); *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.) (manager of a branch office who directed the work of other employees but had no authority to hire and fire); *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F. Supp. 28 (S. D. Iowa) (captain of plant guards); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.) ("key men" or working foremen); *Corey* v. *Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich.) (night superintendent of maintenance); *Fellabaum* v. *Swift & Co.*, 54 F. Supp. 353 (N. D. Ohio) (shipping clerk supervising intrastate distribution of meat packing

trict court states, again in the language of the regulations, that the engineers "customarily and regularly exercised discretionary powers" (Finding 9, R. 150), adding only that they "were entrusted with the care of vital, dangerous and complicated machinery requiring the exercise of discretion to maintain continuous operation" (*ibid.*). There is little evidence as to the exact nature of the work of the engineers, except that they did what operating engineers usually do—maintain and watch the machinery. Certainly, these employees had no executive discretion. To decide that pumps need packing, to read gauges, to listen for disorder in the machinery, is not the exercise of discretion characteristic of a "true executive." See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, p. 13. The stationary engineer is a skilled mechanic [13] who must exercise the discre-

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plant); *Walling* v. *St. Marys Sewer Pipe Co.*, 56 F. Supp. 345 (W. D. Pa.) (kiln foremen); *Simmons* v. *Straight Improvement Co., Inc.*, 7 Wage Hour Rept. 1060 (S. D. N. Y.) (superintendent of loft building); *Distelhorst* v. *Day & Zimmerman*, 58 F. Supp. 334 (S. D. Iowa) (building foremen, chief clerk, yard foreman); *Pakarinen* v. *Butler Bros.*, 218 Minn. 496, 16 N. W. 2d 769 (shift boss of mine).

[13] He is so listed in the United States Employment Service, *Dictionary of Occupational Titles*, Part II, *Titles and Codes*, 1939, p. 45, and by the Bureau of the Census, *Population—Comparative Occupation Statistics for the United States, 1870–1940*, 1943, p. 186, and is so regarded by the presi-

tion of a skilled mechanic within the limits of his job. As the district court said of the operation of radio transmitting equipment in *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 185, affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, this is "essentially a mechanical task of a skilled nature." There, as here, the duties were not executive but were, in contrast, "skilled mechanical work."

(F) [11] The record likewise does not support the trial court's finding that the last condition of the exemption had been met, that the engineers "did not perform work of the same nature as that performed by non-exempt employees for more than twenty per cent (20%) of the number of hours worked in the work week by the non-exempt employees under their direction" (Finding 9, R. 150). Since there were no employees under the direction of the operating engineers, it is, of course, difficult to say how this test can be applied here. Obviously, it implies that the definition refers only to persons directing the work of other employees. But even if the boiler room employees were to be regarded as under the direction of the operating engineers, it is clear that the work of

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dent of the International Union of Operating Engineers. See "The Other Fellow's Job, The Engineer," *American Federationist*, Vol. 48, No. 2, August 1940, pp. 19–20.

[11] As already indicated, the engineers admittedly met the requirements of paragraph (E) of the regulations.

the latter was almost entirely manual,[15] and therefore of nonexempt nature. Again the district court's findings that this test was met, which is in the nature of a conclusion, is contradicted by the evidentiary finding that the engineers' duties consisted of "packing, wiping, mopping, oiling," etc. (R. 149). This type of situation is expressly dealt with in the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, p. 18, referred to, *supra,* where it is stated: "Normally manual labor, including the operation and repair of machinery, will properly be counted as nonexempt work. Any exception to this may be found where the supervisor of a department sometimes participates in repair work of an unusually difficult nature which his subordinates cannot perform and which directly affects the continued operation of his whole department. Such instances would be rare." Significantly, the uncontradicted evidence in this case shows that the "repair work of an unusually difficult nature" had to be handled by the chief engineer, Latteman (R. 43, 56; see also Finding 9, R. 149). Ob-

[15] There is no evidence that the engineer did any nonmanual work except possibly the statement of O. W. Marsh that "many times they sit out there in a rocking chair just listening" (R. 112). Even if it be assumed that the work of the engineers was only partly manual, respondent clearly did not sustain the burden of proving that the manual functions did not exceed 20 percent of the number of hours worked in the workweek by the boiler room employees.

viously, it is he, and no one else who was the supervisor of the power plant.[16]

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

GEORGE M. SZABAD,
Attorney,
United States Department of Labor.

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[16] As stated in the Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, "A small department in a plant or in an office is usually supervised by one person. Any attempt to describe one of the other workers in the department as an assistant supervisor merely by giving him an honorific title will almost inevitably fail as there will not be sufficient true supervisory work to keep two persons occupied unless one of them performs a substantial amount of work like that performed by the nonexempt employees" (pp. 11–12).

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